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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PRECISE CASTINGS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does The National Labor Relations Act Impose Any Minimal Obligations Upon The National Labor Relations Board To Assist Other Than English-Literate Voters In Representation Elections, And If So, Did The Board's Region 13 Meet Those Minimal Obligations In This Case?

2. Is The National Labor Relations Board's Practice Of Delegating Complete Regional Autonomy On Balloting Procedures, In Instances Where A Substantial Portion Of The Voters Are Other Than English-Literate, In Conflict With The Policy Of National Uniformity Embodied In The National Labor Relations Act?

3. Has The National Labor Relations Board Articulated Findings, Conclusions And A Basis For Its Decision And Order Such That It Is Reviewable By The Courts?

4. Did The Court Below Properly Review The National Labor Relations Board Order Involved In This Case?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

PARTIES TO THE PROCEEDING[1]..... ii

TABLE OF AUTHORITIES..... iv

REFERENCE OF REPORTS AND OPINIONS..... 1

JURISDICTIONAL STATEMENT..... 1

STATUTES INVOLVED..... 2

STATEMENT OF THE CASE..... 4

ARGUMENT IN SUPPORT OF THE PETITION..... 10

I. CERTIORARI IS APPROPRIATE TO RESOLVE A SPLIT IN THE CIRCUITS CONCERNING THE RIGHTS OF OTHER THAN ENGLISH-LITERATE VOTERS IN BOARD-CONDUCTED REPRESENTATION ELECTIONS..... 10

II. CERTIORARI IS NECESSARY TO PROTECT THE INTEGRITY OF THE FEDERAL ADMINISTRATIVE SCHEME UNDER THE NATIONAL LABOR RELATIONS ACT..... 16

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1. The parties to the earlier proceedings before the Seventh Circuit Court of Appeals appear on the caption of this petition. The National Labor Relations Board came before the Court of Appeals as the Petitioner for enforcement of its Order. Precise Castings, Inc., the Respondent before the Court of Appeals, has no parent company or subsidiary affiliates.

III. THE COURT'S GUIDANCE IS NEEDED TO SCRUTINIZE THE BOARD'S CONDUCT OF REPRESENTATION ELECTIONS UNDER APPLICABLE STANDARDS OF JUDICIAL REVIEW..... 25

CONCLUSION..... 33

APPENDIX A..... 1a

APPENDIX B.....10a

APPENDIX C.....22a

APPENDIX D.....25a

TABLE OF AUTHORITIES

Cases: Page

Atchison, T. & S.F.R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973)..... 8,9

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978)..... 27

Bridgeport Fittings, Inc. v. NLRB, 877 F.2d 180 (2nd Cir. 1989)..... 13,16

Burlington Truck Lines v. United States, 371 U.S. 156 (1962)..... 21

Celotex Corp., 266 NLRB 802 (1983)..... 25

Flo-Tronic Metal Mfg., Inc., 251 NLRB 1546 (1980)..... 20,28

General Shoe Corp., 77 NLRB 124 (1948)..... 20

Gorey Associated Industries, Inc., 275 NLRB 1303 (1985)..... 26

Kraft, Inc., 273 NLRB 1484.....20,21,22,28

Marriott In-Flite Services, 171 NLRB 742 (1968).....17,18,19,21,22,23

Marriott In-Flite Services v. NLRB, 417 F.2d 563 (5th Cir. 1969), cert. den. 397 U.S. 920.....10,11,12,13,16,21

Midland Life Ins. Co., 263 NLRB 127 (1982).....23,24,25

Newport News Shipbuilding and Dry Dock Company v. NLRB, 608 F.2d 108 (4th Cir. 1979)..... 16

New York Tel. Co. v. New York Dept. of Labor, 440 U.S. 519 (1979)..... 30

NLRB v. A.J. Tower Co., 329 U.S. 324 (1946)..... 30,31

NLRB v. Baptist Hospital, Inc., 442 U.S. 773 (1979)..... 26

NLRB v. Curtin Matheson Scientific, Inc., _____ U.S. _____, 110 S.Ct. 1542, 108 L.Ed. 2d 801, 58 USLW 4407 (1990)..... 26,27

NLRB v. Drivers Local Union, 362 U.S. 274 (1960)..... 32

NLRB v. Financial Institution Employees, 475 U.S. 192 (1986)..... 31

NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965).....15,17,19,24

NLRB v. Precise Castings, Inc., 915 F.2d 1160 (7th Cir. 1990).....1, 9,12,14,23,27,29,31

NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973)..... 31,32

Norwestern Products, Inc., 226 NLRB 653 (1976)..... 21

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)..... 17

Pr[illegible]se Castings, Inc., 294 NLRB No. [illegible] (1989)..... 8

Puerto Rican Organization for Political Action v. Kusper, 490 F.2d 575 (7th Cir. 1973)..... 33

Railway Clerks v. Employees Assoc., 380 U.S. 650 (1965)..... 32

Rattan Art Gallery, Ltd., 260 NLRB 255 (1982)..... 20

South Prairie Const. Co. v. Operating Engineers, 425 U.S. 800 (1976)..... 24

Tanforan Park Food Purveyors Council v. NLRB, 656 F.2d 1358 (9th Cir. 1981)..... 13,16

The Nyack Hospital, 243 NLRB 257 (1978)..... 19

Thermalloy Corp., 233 NLRB 428 (1977)..... 19,21

Thomas A. Nelson d/b/a Trio Metal Cap Division, 168 NLRB 802 (1967).....17,18,19,22

United States v. Chicago, M., St. P. & R.R. & P.R. Co., 294 U.S. 499 (1935)..... 22

V.I.P. Limousine, Inc., 274 NLRB 641 (1985)..... 25,26

Statutes:

28 U.S.C. Sec. 1254(1)..... 1

29 U.S.C. Sec. 151..... 9

29 U.S.C. Sec. 157.....2,31,32

29 U.S.C. Sec. 158..... 8

29 U.S.C. Sec. 159.....2,3,20,31,32

29 U.S.C. Sec. 160..... 9

Miscellaneous:

Morris, The Developing Labor Law (Second Ed., Vol. 1)..... 25

NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11314 (GPO 1984)..... 7

NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11314 (GPO 1989)..... 7

REFERENCE OF REPORTS AND OPINIONS

The Opinion of the court below is reported in the Official Federal Reports, at 915 F.2d 1160 (7th Cir. 1990), and is included herein as Appendix A. The Board's Decision and Order is reported at 294 NLRB No. 94 (1989) (cf. Appendix B). Also included as Appendices are the Board's unreported Decision and Certification of Representative (Appendix C), and the unreported Hearing Officer's Report on Objections and Challenged Ballots (Appendix D).

JURISDICTIONAL STATEMENT

This petition for a writ of certiorari seeks to bring a judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 17, 1990, before this Court for review. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended, Secs. 7 and 9, 29 U.S.C. Secs. 157 and 159, provide in part:

> **Sec. 7.** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
>
> **Sec. 9(a).** Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

Sec. 9(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board -

(A) by an employee or group of employees or any individual or labor organization . . .; or

(B) by an employer . . .: the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT OF THE CASE

This case originates from a Representative Certification ("RC") petition filed on May 16, 1988 with the National Labor Relations Board's (hereinafter, "NLRB" or the "Board") Region 13, in Chicago, Illinois. (App. 25a, et seq.) The petition was filed by Local 18-B of the Electronic, Electrical, Salaried, Machine and Furniture Workers Union, seeking the Board's certification as the bargaining representative of Precise Castings, Inc.'s (hereinafter, "Precise") production, maintenance, and tool room employees at its Franklin Park, Illinois facility. (Id.)

The Board's Regional Director scheduled an election among the approximately 41 eligible voters to take place on July 28, 1988. During typical pre-election communica-

tions with a field attorney for NLRB Region 13, counsel for Precise made it known that most of the eligible voters were Spanish-speaking individuals and that a substantial number of the voters could not read or write in English, only in Spanish. (App. 30-31a.) Consequently, on two occasions prior to the July 28 election, counsel for Precise requested that a bilingual (Spanish/English) ballot - similar to ballots used by the majority of the NLRB's Regions - be used in the scheduled election. (Id.)

NLRB Region 13's agent refused Precise's request for Spanish translation on the ballot to be used in the scheduled election, asserting that the Region's policy was to use only English ballots in all elections, regardless of the composition of the voting polity. (App. 31a.)

Instead, Precise was told, NLRB Region 13's policy was to furnish Notices of Election in any language required as a means of translation auxiliary to its English-only ballots. (Id.) Accordingly, Precise was furnished with Spanish language Notices of Election and they were posted at its premises as required by the Board.

Approximately 34 (or 83 percent) of the 41 eligible voters cast ballots in the July 28, 1988 election. (App. 26a.) The Regional Director tallied 18 votes for the union, 13 votes against the union, and 5 challenged ballots (two were challenged because the voters were not on the list of 41 eligible voters). (App. 29a.)

On August 4, 1988, Precise filed timely objections to the conduct of the election, principally charging that voters in the election were insufficiently apprised of their choice due to Region 13's insistence on

an English-only ballot in an election among a substantially Spanish-only literate polity. Following a hearing on September 7, 1988, the Hearing Officer for NLRB Region 13 issued a Report on Objections and Challenged Ballots recommending that a Certification of Representative issue from the Board. (App. D.) The Hearing Officer reasoned in his report that neither the NLRB Casehandling Manual[2] or the Board's prior decisions prohibited the use of an English-only ballot, regardless of language problems, and only

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2. The Board's Casehandling Manual in effect at the time of this election provided: "If a foreign language notice is used that language must also be used on the ballot." NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11314 (GPO 1984). Since the filing of Precise's objections to NLRB Region 13's procedure for balloting in this action, the word "must" has been replaced by the word "may." NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11314 (GPO 1989).

proven confusion suffered by the voters would justify Precise's objections. (App. 36-43a.)

On February 6, 1989, a three-member panel of the NLRB, in Washington, D.C., entered a final Decision and Certification of Representative in Case No. 13-RC-17367 adopting, without further comment, the analysis and recommendation of the Hearing Officer for Region 13. (App. C, 22-24a.)

On June 14, 1989, a three-member panel of the NLRB issued its Decision and Order in Case No. 13-CA-28430, holding that Precise violated 29 U.S.C. Sec. 158(a)(5) by failing to bargain with the newly certified union. Precise Castings, Inc., 294 NLRB No. 94 (1989). (App. B, 10-20a.)

The Board's jurisdiction over this matter throughout the course of the foregoing administrative proceedings derives from the National Labor Relations Act, as amended. 29 U.S.C. Sec. 151, et seq. On November 28,

1989, pursuant to jurisdiction conferred upon the United States Courts of Appeals by Section 10(e) of the Act (29 U.S.C. Sec. 160(e)), the Board petitioned the Seventh Circuit Court of Appeals for enforcement of its Decision and Order in Case No. 13-CA-28430.

On October 17, 1990, the Court of Appeals issued its Opinion and entered its Judgment enforcing the Board's Decision and Order. NLRB v. Precise Castings, Inc., 915 F.2d 1160 (7th Cir. 1990). (App. A, 1-9a.)

ARGUMENT IN SUPPORT OF THE PETITION

I. Certiorari Is Appropriate To Resolve A Split In The Circuits Concerning The Rights Of Other Than English-Literate Voters In Board-Conducted Representation Elections.

The decision of the Seventh Circuit stands in conflict with the precedent of at least three other circuits. This split among the circuits concerns the validity of NLRB certified election results in instances where English-illiterate voters are not provided translated election materials. Certiorari from the Court could address the existing discordant treatment of other than English-literate voters and further the objective of finality in Board-conducted representation elections.

The Fifth Circuit, in Marriott In-Flite Services v. NLRB, 417 F.2d 563 (5th Cir. 1969), cert. denied, 397 U.S. 920, 90 S.Ct.

929, 25 L.Ed. 2d 101 (1970), set aside the Board's certification of an election conducted under circumstances nearly identical to those in the instant matter. In Marriott, as in the present case, the Board's Region 13 in Chicago, Illinois refused to provide other than English-only ballots after its Regional Director was informed that a substantial percentage of eligible voters were literate only in Spanish.[3] Bilingual election notices were the sole means used by

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3. Ironically, when Marriott was decided more than 20 years ago, Region 13 was the only NLRB region known to have a policy of never granting foreign language ballots, whatever the circumstances. Id. at 565 (and n. 2). The Marriott court noted, however, that Region 13 had announced (apparently during the pendancy of that case) that it would in the future provide foreign language ballots where a language problem existed. Id. Sometime between 1969 and 1988, Region 13 must have again reversed itself and gone back to its policy of providing ballots printed only in English, as stated by the Board's Agent prior to the instant election. (App. 31a.)

the Board to communicate with the Spanish-speaking voter (Spanish-speaking officials were not present at the polls in the instant election, as they were in Marriott). See Marriott, Id. at 567; Precise, Id. at 1163. (App. 5a.)

The Fifth Circuit denounced the policy of Region 13 as being "out of step with the rest of the country." Marriott, Id. at 566. The court asserted that the validity of representation elections requires that minimum standards of fairness be met (Id. at 566, 567), and held:

> We agree with the employer that the Board's policies do require that foreign language ballots be available where a substantial number of eligible employees do not speak English, and that such ballots must be provided to allow a fair election. Id. at 564. (Emphasis added.)

Citing Marriott, the Ninth Circuit charged the NLRB with an "affirmative duty" to provide those who do not read English with

translation of "the basic information necessary to an informed choice." Tanforan Park Food Purveyors Council v. NLRB, 656 F.2d 1358, 1363 (9th Cir. 1981).

Subsequently, in Bridgeport Fittings, Inc. v. NLRB, 877 F.2d 180, 187 (2nd Cir. 1989), the Second Circuit relied on both Marriott and Tanforan Park when it stated:

> When the record shows that a significant number of employees may have been prevented from intelligently participating due to a failure to translate the ballot . . . the election should be set aside. (Citations omitted.)[4]

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4. What number of potentially affected employees are "significant" varies with the particular circumstances of an election. It should be noted, however, that it was stipulated to by the parties in the instant matter that approximately 10 of 41 eligible employees spoke and read no English, only Spanish. (App. 30a.) Without question, this number is significant in view of the fact that the election was decided by only 5 votes. (App. 26a.)

The Seventh Circuit broke from this line of cases when it upheld the Board's Certification of Representative, despite Region 13's use of an English-only ballot for an electorate of approximately one-quarter Spanish-speaking, English-illiterate voters. NLRB v. Precise Castings, Inc., 915 F.2d 1160 (7th Cir. 1990). (App. 1a.) Noting that this election may have been "imperfect," the Seventh Circuit nevertheless held: "Choosing how much imperfection to accept is for the Board." Id. at 1164. (App. 7a.) Thus, the court concluded that it lacked grounds on which to upset the election absent record evidence of "actual confusion" among the employees resulting from the English-only ballot. Id. at 1161, 1164. (App. 2, 8a.)

As a result of the Precise Castings decision, the split in the circuits is twofold:

> (1) The Seventh Circuit feels that the courts lack grounds to establish even minimal standards to ensure the free choice of non-English speaking persons in representation elections, whereas the Second, Fifth and Ninth Circuits would limit the Board's otherwise broad discretion in these regards; and
>
> (2) The Seventh Circuit stands alone in requiring evidence of actual voter confusion to support an objection that the Board's certification of representative was not supported by substantial evidence.[5]

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5. See Marriott, Id. at 567 ("the party challenging the election should not have to prove actual prejudice to the outcome"; Tanforan Park, Id. at 1363 (based only on the election materials, it was "likely that confusion resulted"); Bridgeport Fittings, Id. at 187, 188 (requiring only that non-English speaking voters be sufficient in number to have affected the outcome of the election); cf. Newport News Shipbuilding and Dry Dock Company v. NLRB, 608 F.2d 108, 111 (4th Cir. 1979) (validity of election is determined by what is likely to have occurred under the particular circumstances of the election).

II. Certiorari Is Necessary To Protect The Integrity Of The Federal Administrative Scheme Under The National Labor Relations Act.

This Court has declared that the integrity of the administrative process is undermined when reviewing courts' "substitute counsel's rationale or their discretion for that of the Board." NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 444, 85 S.Ct. 1061, 13 L.Ed. 2d 951 (1965). As a corollary to this principle, before the Board's actions may be properly reviewed, it must articulate the reasons for its decision, "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." Metropolitan Life, 380 U.S. at 442-43.

In the instant matter, the Board offered no discernable basis for its decision, and, perhaps as a result, the Seventh Circuit was lured from "the narrow confines of law into

the more spacious domain of policy." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197, 61 S.Ct. 845, 85 L.Ed. 2d 1271 (1941) (cited in Atchison, T. & S.F.R. Co. v. Wichita Board of Trade, 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed. 2d 350 (1973).

The Board adopted, without comment, its Hearing Officer's Report on Objections and Challenged Ballots. (App. C, 22-24a.) The Hearing Officer relied principally upon the Board's 1967 and 1968 decisions in Thomas A. Nelson d/b/a Trio Metal Cap Division, 168 NLRB 802 (1967) and Marriott In-Flite Services, 171 NLRB 742, 743, n. 4 (1968), respectively. (App. 37-43a.)[6]

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6. In both Nelson and Marriott, the Board stated that Region 13's use of an English-only ballot, when supplemented by Notices of Election in foreign languages required by employees, was permissible (unless a challenging party could demonstrate that actual voter confusion resulted from the failure to translate the ballot).

Nelson and Marriott, however, are irreconcilable with over 20 years of subsequent Board precedent to date. Notwithstanding the Board's authority to reverse its thinking, it owes the courts some kind of an explanation, if this is indeed what it has done. For whatever manner the Board chooses to formulate the basis of its order, whether by reference to other decisions or some other means, it still must meet the criteria for judicial review. Metropolitan Life, 380 U.S. at 443, n. 6.

Following the 1960's, in Thermalloy Corp., 233 NLRB 428, 429 (1977), the Board set aside an election because "laboratory conditions for holding a fair election were not met" where Spanish Notices of Election were not posted (ballots were not at issue); cf. The Nyack Hospital, 243 NLRB 257 (1978) (citing numerous cases upholding the

"laboratory conditions" standard for Board conduct in an election).

In 1980, the Board held that Spanish translated ballots and the campaigning of the employer and union could not cure the defect of an incomplete translation of the Notice of Election. Flo-Tronic Metal Mfg., Inc., 251 NLRB 1546 (1980); accord, Rattan Art Gallery, Ltd., 260 NLRB 255 (1982). In Rattan, Id. at 256, the Board reiterated its zealous role in supervising elections under Section 9(c)(1) (29 U.S.C. Sec. 159(c)(1)):

> The Board has long held that it is its function and duty under the National Labor Relations Act to establish in election proceedings conditions as nearly ideal as possible to determine the uninhibited desires of the employees (citing General Shoe Corp., 77 NLRB 124 (1948)).

In 1985, in Kraft, Inc., 273 NLRB 1484, the Board set aside an election because the ballot was "poorly translated" for Spanish, Vietnamese and Laotian-speaking employees.

Id. The Kraft Board determined that neither properly translated Notices of Election, or the parties' instructional election campaigning, could cure the defective ballots. Id. (Citing Thermalloy Corp., 233 NLRB 428 (1977), and Marriott In-Flite Services v. NLRB, 417 F.2d 563 (5th Cir. 1969, denying enf. 171 NLRB 742 (1968).)[7]

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7. The NLRB's General Counsel argued in his brief to the Seventh Circuit that the decision in Norwestern Products, Inc., 226 NLRB 653 (1976) upheld the Board's continued adherence to its holding in Marriott, despite the Fifth Circuit's reversal of that decision. True, the Board did state such an adherence "until such time as the Supreme Court may determine the issue." Norwestern, Id. at 654, n. 6. By 1985, however, the Kraft Board had taken the position of the Fifth Circuit in Marriott (not the Board) that Notices of Election alone are insufficient to properly apprise voters of their rights in an election. Kraft, Id. at 1484. Ignoring Kraft, the Seventh Circuit improperly accepted "appellate counsel's post-hoc rationalizations" that Norwestern Products continued to represent Board policy (or lack thereof). Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed. 2d 207 (1962).

The Board's citation to its 1960's decisions in Marriott and Nelson must be reconciled with its many more recent cases upholding "laboratory conditions" for elections. Specifically, these decisions must be reconciled with Kraft, Id., which, as of 1985, had adopted the Fifth Circuit's position overturning the Board in Marriott. Id. at 1484. Until this is done, appropriate judicial review is impossible, for as Justice Cardozo so aptly stated on behalf of the reviewing courts: "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." United States v. Chicago, M., St. P. & PR Co., 294 U.S. 499, 511, 55 S.Ct. 462, 79 L.Ed. 2d 1023, (1935).

The decision of the Seventh Circuit further undermined the integrity of the administrative process by articulating the

Board's rationale for its decision where the Board itself had neglected to do so. The court asserted that "since 1969 there has been a revolution in the Board's thought." Precise Castings, Id. at 1162. (App. 3a.) Citing the Board's decision in Midland National Life Ins. Co., 263 NLRB 127 (1982) (a decision which the Board itself did not rely on in this matter), the Seventh Circuit asserted:

> "Today the Board is much more likely than in 1969 to believe that employees can fend for themselves. It has pulled the rug out from under Marriott. The Board no longer establishes "meticulous safeguards" for elections, so it cannot be "whimsical" to assume that employees can cast accurate votes, despite the fact that the ballot is in English. Questionable, perhaps; whimsical, no."

Precise Castings, Id.

That the Seventh Circuit was out of its domain is evidenced by the fact that the Board itself has never applied its Midland, supra, decision in any context other than

"misrepresentations" affecting the results of an election. A case in point is the Board's decision in Celotex Corp., 266 NLRB 802 (1983), wherein the Board applied Midland solely to alleged misrepresentations, and then an entirely different analysis to objections concerning the Board's conduct of the election. Id. at 802-803. Cf. Tanforan Park, Id. at 1367. The Board dismissed the hearing officer's recommendation that the latter objection be dismissed "because no evidence was presented that any employee had been disenfranchised" by the objectionable conduct of the Board's agent. Id. at 803.[8]

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8. Midland itself sets forth the Board's very confined application of the so-called "Getman" theory: "We will continue to protect against other campaign conduct such as threats, promises, or the like, which interferes with employee free choice." Id. at 133. Moreover, the Board has never applied the "Getman" approach to its standards for the conduct of elections. See Morris, The Developing Labor Law (Second Ed., Vol. 1) at pg. 400: objections to "conduct of the election" should be distinguished from objections to "conduct affecting the results of the election."

Indeed, notwithstanding its earlier, Midland decision, the Board has continued to adhere to its "laboratory conditions" standard concerning objections to conduct of the election. See V.I.P. Limousine, Inc., 274 NLRB 641 (1985); Gorey Associated Industries, Inc., 275 NLRB 1303 (1985); Standard Products Co., 281 NLRB 141, n. 4 (1986).

For the Court of Appeals to apply Midland, supra, to unrelated cases involving the Board's conduct of elections, is "incompatible with the orderly function of the process of judicial review." South Prairie Const. Co. v. Operating Engineers, 425 U.S. 800, 805 (1976) (citing NLRB v. Metropolitan Ins. Co., 380 U.S. 438, 444 (1965)).

III. The Court's Guidance Is Needed To Scrutinize The Board's Conduct Of Representation Elections Under Applicable Standards Of Judicial Review.

As recently as its decision in NLRB v. Curtin Matheson Scientific, Inc., _____ U.S. _____, 110 S.Ct. 1542, 1545, 108 L.Ed. 2d 801 (1990), the Court reiterated that "the courts have the duty to review the Board's presumptions 'for consistency with the Act, and for rationality'" (citing NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 787, 99 S.Ct. 2598, 2606, 61 L.Ed 2d 251 (1979), quoting Beth Israel Hospital v. NLRB, 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed. 2d 370 (1978)). When the statutory standards have been applied, the Board's decision must be further reviewed under the substantial evidence standard. Curtin Matheson, 110 S.Ct. at 1545 n. 2, 1554-55 (Chief Justice

Rehnquist, concurring), 1557, et seq. (Justices Scalia, O'Connor and Kennedy, dissenting).

To rule as it did in this matter, the Board must have, sub silentio, taken the position attributed to it by the court below. The Seventh Circuit stated that today, the Board presumes that "employees can fend for themselves," and figure out how to vote on English-only ballots by using translated election notices. Precise Castings, Id. at 1162. (App. 3a.) This presumption cannot stand if it does not pass muster as being either (1) rational under, or (2) consistent with, the NLRA. Moreover, the instant Board certification must be supported by substantial evidence if the Court is to uphold it. Curtin Matheson, Id. at n. 2.

Addressing the rationality of the Board's decision, the court below stated "Although the ballot appears only in English,

and the employee therefore cannot read the question being asked, neither the union nor employer will leave the employee in doubt." Precise Castings, Id. at 1162. This rationale conflicts with the Board's expert view that campaigning of the parties does not fulfill its duty to apprise voters of their choice.[9] Kraft, Id. at 1484; Flo-Tronic, Id. at 1546.

One consequence of the Board's decision that simply could not be rationalized under the NLRA is the fact that most Board regions

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9. The court also reasoned that English-only ballots would avoid problems with translations that may "frustrate indefinitely the implementation of employees' legitimate selection." Precise, Id. at 1164. (App. 7a.) This begs the question, since the question is whether a legitimate selection was made in the first instance. English-only ballots cast by voters who do not speak English are not evidence that a meaningful choice has been made. The lower court's decision serves only to discourage, rather than encourage, finality of elections since voter rights may not be asserted until blatantly violated, resulting in "actual confusion" that must be somehow demonstrated after the election. Precise, Id.

"use multi-lingual ballots some if not all of the time, while Region 13 never uses them." Precise Castings, Id. at 1164. (App. 7a.) The Court's analogy to the United States attorneys, "94 semi-autonomous prosecutors," provides absolutely no rational defense to the ultimate question: Why are non-English speaking persons in most Board regions entitled to translated election ballots whereas voters in Region 13 must "fend for themselves?"

On the issue of whether the Board's decision was consistent with the Act, the court below summarily concluded: "Nothing in the National Labor Relations Act prevents the Board from giving its subordinates discretion in matters of this kind."[10] Id. (App. 7-8a.)

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10. If this is true, then the court's recognition of an overriding interest in a uniform, nationwide interpretation of the NLRA by a centralized expert agency created by Congress has no meaning. See New York Tel. Co. v. New York Dept. of Labor, 440 U.S. 519, 99 S.Ct. 1328, 59 L.Ed. 2d 553 (1979).

The Seventh Circuit refused to reconcile the Board's decision with the policies of the NLRA. Instead, the Court declared its repeated reliance on the decision of NLRB v. A. J. Tower Co., 329 U.S. 324, 67 S.Ct. 324, 91 L.Ed. 322 (1946) for the proposition that "the Board possesses discretion to set the rules for conducting elections and to determine what procedures suffice to protect the employees' right to choose." Precise Castings, Id. at 1162. (App. 4a.)[11] As the

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11. Tower, however, was decided prior to the 1947 Taft-Hartley amendments to the NLRA, wherein Section 7 was amended to specifically recognize the right of employees to refrain from joining a union (29 U.S.C. Sec. 157), and Section 9 (c)(1)(B) was amended to mandate (rather than permit) that the Board conduct a representation election under stated circumstances (29 U.S.C. Sec. 159 (c)(1)(B)). As a result, subsequent to Taft-Hartley, the Board's "discretion" in conducting elections has more recently been recognized as a "duty." NLRB v. Savair Manufacturing Co., 414 U.S. 270, 276, 94 S.Ct. 495, 38 L.Ed. 2d 495 (1973) ("We said in NLRB v. Tower Co., 329 U.S. 324, 330, that the duty of the Board was to establish the procedure and safe-guards necessary to ensure the fair and free choice of bargaining representatives by employees.'").

court stated in NLRB v. Financial Institution Employees, 475 U.S. 192, 202, 106 S.Ct. 1007, 89 L.Ed. 2d 151 (1986):

> "Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'" (Citations omitted.)

Paying homage to the Court's 1946 decision in Tower Co., Id. does not fulfill the courts' duty to scrutinize Board decisions under the Congressional policies embodied in the NLRA.

By enacting the Taft-Hartley amendments in 1947 (June 23, 1947, c. 120, Title I, Sec. 101, 61 Stat. 143), Congress took pains to specifically articulate the right of employees to not only join a union, but to refrain from joining a union as well. 29 U.S.C. Sec. 157. The Court has acknowledged the tension created by these conflicting rights. NLRB v. Savair Mfg. Co., 414 U.S. 270, 276-77, 94 S.Ct. 495, 38 L.Ed. 2d 495

(1973); NLRB v. Drivers Local Union, 362 U.S. 274, 279-80, 80 S.Ct. 706, 4 L.Ed. 2d 710 (1960). A representation election conducted by the Board pursuant to Section 9 of the Act (29 U.S.C. Sec. 159) represents perhaps the most fundamental means by which employees choose.[12]

The Board itself trenches impermissibly on the rights of employes under Section 7 of the NLRA when English-only ballots are used in an election among a substantially Spanish (or other foreign language) speaking electorate. As the Seventh Circuit stated in Puerto Rican Organization for Political

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12. Justice Stewart, in his dissent in Railway Clerks v. Employees Assoc., 380 U.S. 650, 672 (1965) stated: "The ballot lies at the heart of the Board's certification mechanism." He was referring to the National Mediation Board in its certification of representatives under the Railway Labor Act, but at the same time, noting the similarity between procedures enunciated under the NLRA. Railway Clerks, at 675, n. 5.

Action v. Kusper, 490 F.2d 575, 579 (7th Cir. 1973), it would be a "self-defeating notion that an illiterate has the right (to) pull the lever of a voting machine, but not the right to know for whom he pulls the lever."

Finally, we submit, based upon all of the foregoing arguments that the Board's factual finding that a majority of the voters in the instant election desire a union (irrespective of whether the Board presumes that Spanish-speaking voters affected a free choice using English-only ballots) is unsupported by substantial evidence in the record. There is simply insufficient evidence in the record below that this election was conducted in such a way as to insure that employees involved in this election were afforded a fair opportunity to be apprised of the important choice they were faced with (supra, p. 13, n. 4).

CONCLUSION

This Court should issue a writ of certiorari to the Seventh Circuit based upon all of the questions presented for review in this petition.

Respectfully submitted this 14th day of January, 1991.

PRECISE CASTINGS, INC.

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APPENDICES

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-3560

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

PRECISE CASTINGS, INC.,

Respondent.

Petition to Enforce an Order of the
National Labor Relations Board.

ARGUED SEPTEMBER 12, 1990—DECIDED OCTOBER 17, 1990

Before WOOD, JR., and EASTERBROOK, *Circuit Judges*, and GRANT, *Senior District Judge.**

EASTERBROOK, *Circuit Judge.* Must the National Labor Relations Board print ballots in all languages used in the workplace? Unless the answer is "yes" in every case, we must enforce the Board's order requiring Precise Castings, Inc., to bargain with Local 18-B of the Electronic, Electrical, Salaried, Machine and Furniture Workers union. This union won an election at Precise Castings by a vote of 18 to 13, with 2 spoiled ballots and 3 challenged votes. The ballots were in English. Ten of the 41 employees eligible to vote read and speak only Spanish. None of them

* Hon. Robert A. Grant, of the Northern District of Indiana, sitting by designation.

has complained to the Board, and Precise Castings did not introduce evidence suggesting that even one of its Spanish-speaking employees was confused. Unless we create a *per se* rule that the Board must print ballots in the languages preferred by the employees, there is no reason to deny effect to its order in this case.

The National Labor Relations Act guarantees a free choice of representative (or no representative). 29 U.S.C. §157. Elections allow the employees to express their choice. Precise Castings argues that ballots in an unreadable language may prevent the employees from expressing that choice accurately. Although Spanish-speaking persons living in the United States undoubtedly know that "yes" means "si" and that "no" has the same meaning in both languages, they may not know what question is being asked, that "yes" expresses a preference for a particular union, as opposed to the status quo. Only a multilingual ballot assures the "laboratory conditions" necessary to effective choice, Precise Castings submits, with support from *Marriott In-Flite Services v. NLRB*, 417 F.2d 563 (5th Cir. 1969). Contra, *NLRB v. Lowell Corrugated Container Corp.*, 431 F.2d 1196 (1st Cir. 1970).

The fifth circuit found two defects in the use of English ballots when a third of the voters were literate only in Spanish. First, the court believed, the election departed from the Board's policy of using bilingual ballots; second, the court thought that elections using ballots printed in a language employees cannot understand are unfair. 417 F.2d at 567. The first of these need not detain us. Since *Marriott* the Board has made it clear that it has no policy requiring the use of ballots in multiple languages. *Northwest Products, Inc.*, 226 N.L.R.B. 653 (1976). The last vestige of that policy, if the Board ever had one (it denied having one at the time of *Marriott*, and *Lowell* concluded that it had none), was a statement in the General Counsel's practice manual that if a regional director deems election notices in multiple languages appropriate, the director also should print ballots in those languages. *Casehandling Manual* pt. 2 §11314 (1984) ("If a foreign language notice is used, that language must also be used on

the ballot."). The current version of the *Manual* §11314 (1989) changes this to: "If a foreign language notice is used that language may also be used on the ballot."

Marriott's second and principal conclusion is that when many voters have "no access to ballots in language [they] can understand [the election] necessarily falls below the minimum laboratory standards of fairness. . . . [I]t would be whimsical to establish meticulous safeguards against coercion, misinformation, and corruption if a sizeable portion of the electorate, though untrammeled in its choice, does not know how to exercise it." 417 F.2d at 567 (footnotes omitted). When the fifth circuit wrote this in 1969, the Board required elections to take place in "laboratory conditions", free from the distortions common in political contests. *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962); *Gummed Products Co.*, 112 N.L.R.B. 1092 (1955). This doctrine was based in part on a belief that labor elections should be "better" than political ones, and in part on a belief that employees were easily misled and incapable of expressing their true choice except in "laboratory conditions". Since 1969 there has been a revolution in the Board's thought. Partly in response to research showing that employees were considerably more capable, and threats or propaganda less effective than the Board had believed, see Julius G. Getman, Stephen B. Goldberg & Jeanne B. Herman, *Union Representation Elections: Law and Reality* (1976), the Board overruled *Hollywood Ceramics*. *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), overruled by *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978), overruled by *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982). Today the Board is much more likely than in 1969 to believe that employees can fend for themselves. It has pulled the rug out from under *Marriott*. The Board no longer establishes "meticulous safeguards" for elections, so it cannot be "whimsical" to assume that employees can cast accurate votes despite the fact that the ballot is in English. Questionable, perhaps; whimsical, no.

Following the lead of *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946), we have held repeatedly that the Board possesses discretion to set the rules for conducting elections and to determine what procedures suffice to protect the employees' right to choose. E.g., *NLRB v. Lovejoy Industries, Inc.*, 904 F.2d 397, 402 (7th Cir. 1990); *Mosey Manufacturing Co. v. NLRB*, 701 F.2d 610, 615 (7th Cir. 1983) (in banc). Cf. *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *NLRB v. Bufco Corp.*, 899 F.2d 608, 610-11 (7th Cir. 1990); *Communication Workers v. NLRB*, 784 F.2d 847, 849 (7th Cir. 1986). Making labor elections more like political elections is among the Board's legitimate choices. And most ballots in political elections are in English. True, the Voting Rights Act has, since an amendment in 1975, 42 U.S.C. §1973aa-1a(b), required covered jurisdictions to offer ballots in languages used by 5% of the populace, if those groups are below the national norm in literacy. In the main, however, persons who do not speak English must learn from other sources how to cast an effective vote. See also *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575 (7th Cir. 1973) (a covered jurisdiction could comply with the version of the Voting Rights Act then in force by providing directions in Spanish without necessarily printing the ballots in Spanish).

Voting for one's choice is the least worry of a person who does not speak English. How is this person to *choose*? The campaign is in English, the principal media are in English. Anyone who aspires to informed preferences must read newspapers in other languages, discuss the subject with friends who can follow the campaign in English, and so on. A person with the ability to make an intelligent choice is likely to have the resources to express this choice at the polls. This is so of labor elections no less than of political elections. When a significant fraction of the employees neither speak nor read English, both the union and the employer will campaign to the employees in their own language. Seeking support, both union and employer will seek to persuade; seeking to translate support into

victory, both union and employer will inform employees how to express their choice. So although the ballot appears only in English, and the employee therefore cannot read the question being asked, neither union nor employer will leave the employee in doubt. The union will tell the workers (in their own tongues) to check the "yes" box if they favor it; the employer will ask them to tick "no". Such employees need not read the ballot, any more than English-speaking employees do. Consider illiterate employees: both union and employer ensure that persons who cannot read in *any* language are nonetheless equipped to express a choice. If illiterate employees may choose on English ballots, then employees literate in Spanish may do the same.

The Board does not leave the workers to learn from the election campaign alone. On request of either employer or union, the Board posts elaborate election notices in all languages the workers speak or read. Each notice covers three 8½ × 11 sheets of paper. These notices describe eligibility to vote and the conduct of the election. They include sample ballots, specific to the union and employer. The question on the Board's official ballot is: "Do you wish to be represented for purposes of collective bargaining by [name of union]. Mark an 'X' in the square of your choice". The sample ballot on the Spanish notice is written entirely in Spanish, so that the employees can see the question exactly: "¿Desea usted estar representado para los fines de negociar colectivamente por [name of union]. Marquese con una 'X' dentro del cuadro de su seleccion". "Muestra" ("sample") is emblazoned on the ballot. Immediately above is the advice: "La papeleta reproducida en el presente aviso esta redactada en español y es traducción correcta de la papeleta que Ud. recib; rá en la elección, pero la cual estará impresa en ingles." So the Board tells the employees that this is an accurate translation, but that the ballot at the election will be printed in English. Anyone who takes the trouble to read the notice will be equipped to vote accurately.

As the fifth circuit observes, "[n]otices are not always read." *Marriott*, 417 F.2d at 567. Precise Castings adds that notices may be half-read: an employee may read the "muestra" and think that the ballot will be in Spanish, without reading the complete statement immediately above. Although both of these are true, one could go on. Ballots also are not always read. The number of spoiled or invalid ballots attests to this. Campaigns are not always followed. The clearest ballot in the world will do nothing for an employee who has given the subject no thought and does not know whether the union will be beneficial or detrimental. If we treat employees as children, unable to protect their own interests, then recognition that employees may not read (or may read only part of) the notices may be significant. The Board has abandoned that view of the workers, however, and we have sustained its decision to credit their ability to make intelligent choices even in the face of misleading propaganda. If employees have that ability, they can figure out how to vote using the Board's election notices.

Giving employees this much credit is within the Board's power. It may concentrate (as it does) on giving them a reasonable *opportunity* to vote intelligently, without taking all possible steps to ensure that they do so. Especially when the other options have problems of their own. One is to print ballots in each language any employee uses. Such ballots would be intelligible, but there might be so few in any given language that union or employer could link a vote to a given voter, breaching the confidentiality of the polling place. The second option is to put all of the languages on every ballot. That would work well with two languages, less well as the number of languages increases—and as the ballot must include languages that cannot be expressed in the Roman alphabet. For example, the ballot in *Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 187 (2d Cir. 1989), was printed in English, Spanish, and Portuguese, with Laotian added by hand because the Board cannot produce the necessary characters. The employer attacked this ballot on the ground that the

translations were poor, that the handwritten scrawl on the ballots was confusing, and (inconsistently) that the Board had not *also* handwritten the question in Vietnamese and Cambodian. See also, e.g., *Rattan Art Gallery, Ltd.*, 260 N.L.R.B. 255 (1982) (English-Ilocano ballot), and *Kraft, Inc.*, 273 N.L.R.B. 1484 (1985) (ballot printed in English and Spanish, with handlettering in Vietnamese and Laotian), both setting aside elections because of poor translation on the ballot; *Tanforan Park Food Purveyors Council v. NLRB*, 656 F.2d 1358, 1362-63 (9th Cir. 1981) (remanding so that the Board could consider whether Samoan instructions on ballot were confusing). Election notices may be written by native speakers of the language and printed in the proper characters, avoiding clutter and mis-translation. The result will be imperfect, as *Marriott* and Precise Castings emphasize, but we live in an imperfect world. Striving for perfection makes elections more difficult to conduct, and cases such as *Tanforan* and *Marriott* demonstrate that the search has its own costs. Rerunning elections, or litigating about their validity, may frustrate indefinitely the implementation of the employees' legitimate selection. Choosing how much imperfection to accept is for the Board. See *Lovejoy Industries*.

One final contention requires comment. Precise Castings observes that the Board has not established a national policy but has left to its regional directors the choice among multi-lingual ballots, ballots in different languages, and English ballots plus election notices in other languages. If its plant were located in Connecticut, the employer says, the ballots would have been bilingual; because it is located in Wisconsin (part of the Board's Region 13), its employees received English ballots. Region 13 is in the minority; most of the others use multi-lingual ballots some if not all of the time, while Region 13 never uses them. Disparities of this kind are familiar to those who deal with the United States Attorneys, 94 semi-autonomous prosecutors who exercise considerable freedom in establishing policy. Nothing in the National Labor Relations Act prevents the Board from giving its subordinates

discretion in matters of this kind. One of the objections to the Board's old "laboratory conditions" doctrine was that it never allowed enough differences to learn anything about the need for or effects of its rules. When the regions follow different paths, the Board can evaluate the results and may conclude that one is preferable—or that the costs and benefits of the competing options are so closely balanced that uniformity is unnecessary. So far the Board is of the latter view about the use of multi-lingual ballots. We lack grounds on which to upset its position, when the record contains no evidence of actual confusion.

ENFORCED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—10-17-90—500

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Before: Honorable Harlington Wood, Jr.
Circuit Judge

Honorable Frank H. Easterbrook
Circuit Judge

Honorable Robert A. Grant
Senior District Judge*

No. 89-3560

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
PRECISE CASTINGS, INCORPORATED,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board, No. 13-CA-28430.

This cause was heard on the record from the above mentioned agency, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the decision of the National Labor Relations Board in this cause appealed from be, and the same is hereby, ENFORCED, with costs, in accordance with the opinion of this Court filed this date.

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*The Honorable Robert A. Grant of the Northern District of Indiana, is sitting by designation.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

No. 13-CA-28430

PRECISE CASTINGS, INC.

and

INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, SALARIED, MACHINE AND
FURNITURE WORKERS, AFL-CIO
FURNITURE WORKERS DIVISION - LOCAL 18-B

DECISION AND ORDER

On March 17, 1989, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 13-RC-17367. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On April 17, 1989, the Acting General Counsel filed a Motion for Summary Judgment. On April 19, 1989, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

RULING ON MOTION FOR SUMMARY JUDGMENT

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any repre-

sentation issue that is properly litigable in this unfair labor practice proceeding. See Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. Jurisdiction

The Respondent, an Illinois corporation, manufactures aluminum die castings with an office and place of business in Franklin Park, Illinois, where it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of

the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held June 28, 1988, the Union was certified on February 6, 1989, as the collective-bargaining representative of the employees in the following appropriate unit:

> All regular full-time and regular part-time production, maintenance, and tool room employees employed by the Employer at its facility now located at 9234 Park Lane, Franklin Park, Illinois, but excluding all office employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since February, 1989, the Union has requested the Respondent to bargain and, since February 21, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after February 21, 1989, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (19th cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Precise Castings, Inc., Franklin Park, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO Furniture Workers Division - Local 18-B, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and regular part-time production, maintenance, and tool room employees employed by the Employer at its facility now located at 9234 Park Lane, Franklin Park, Illinois, but excluding all office employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in Franklin Park, Illinois, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 13, after being

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1. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. June 14, 1989.

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John E. Higgins Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO Furniture Workers Division - Local 18-B, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement

reached on terms and conditions of employment for our employees in the bargaining unit:

> All regular full-time and regular part-time production, maintenance, and tool room employees employed by the Employer at its facility now located at 9234 Park Lane, Franklin Park, Illinois; but excluding all office employees, guards, and supervisors as defined in the Act.

PRECISE CASTINGS, INC.

(Employer)

Dated_____ By_____
(Representative)

_____
(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 200 West Adams Street, Suite 800, Chicago, Illinois 60606-5208, Telephone (312) 353-7597.

APPENDIX C

NOT TO BE INCLUDED
IN BOUND VOLUMES

SCH
Franklin Park, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRECISE CASTINGS, INC.,
Employer,

and Case 13-RC-17367

INTERNATIONAL UNION OF
ELECTRONIC, ELECTRICAL,
SALARIED, MACHINE AND
FURNITURE WORKERS, AFL-CIO
FURNITURE WORKERS DIVISION -
LOCAL 18-B,
Petitioner.

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on July 28, 1988 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots

shows 18 for and 13 against the Petitioner. Following the election there were 5 challenged ballots. However, at the hearing the parties stipu'ated that 2 challenged ballots should not be counted, leaving only 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings[1] and recommendations, and finds that a certification of representative should be issued.

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1. To the extent defacement of the notices was argued as objectionable conduct, Member Cracraft relies only on the hearing officer's finding that under the circumstances the defacement was not of the type which would reasonably mislead employees to believe that the Board took a position in the election.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, Furniture Workers Division - Local 18-B, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All regular full-time and regular part-time production, maintenance, and tool room employees employed by the Employer at its facility now located at 9234 Park Lane, Franklin Park, Illinois; but excluding all office employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C., February 6, 1989.

_____
James M. Stephens, Chairman

_____
Mary Miller Cracraft, Member

_____
John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

CORRECTED COPY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

PRECISE CASTINGS, INC.,
Employer,

and

Case 13-RC-17367
RD DIRECTED

INTERNATIONAL UNION OF
ELECTRONIC, ELECTRICAL,
SALARIED, MACHINE AND
FURNITURE WORKERS, AFL-CIO
FURNITURE WORKERS DIVISION -
LOCAL 18-B,
Petitioner.

HEARING OFFICER'S REPORT ON OBJECTIONS AND CHALLENGED BALLOTS

Pursuant to a petition filed on May 16, 1988, and a Decision and Direction of Election issued on June 24, 1988, an election by secret ballot was conducted on July 28, 1988, under the direction and supervision of the Regional Director for Region 13 of the National Labor Relations Board in the following unit:

> All regular full-time and regular part-time production, maintenance, and tool room employees employed by the Employer at its facility now located at 9234 Park Lane, Franklin Park, Illinois; but excluding all office employees, guards, and supervisors as defined in the Act.

The results of the election were as follows:

Approximate number of eligible voters	41
Void Ballots	0
Votes cast for Union	18
Votes cast against participating labor organization	13
Valid votes counted	31
Challenged ballots	5
Valid votes counted plus challenged ballots	36

Challenged ballots are sufficient in number to affect the results of the election.

On August 4, 1988, the Employer filed timely objections to conduct affecting the results of the election, copies thereof being served on the Petitioner. Upon consideration of the challenged ballots, objections, and the parties' respective positions thereon, the Regional Director for Region 13 concluded that substantial and material issues of cred-

ibility were raised which should be resolved as a result of a hearing. Therefore, on August 29, 1988, the Regional Director issued a Supplemental Decision on Challenged Ballots and Objections and Notice of Hearing. He ordered that, pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, amended, a hearing be held before a Hearing Officer of the Board to resolve the issues raised by the challenged ballots and objections and that the Hearing Officer prepare and serve on the parties a report containing resolutions of the credibility of witnesses, findings of facts, and recommendations to the Board as to the disposition of the challenged ballots and objections.

On September 7, 1988, a hearing was conducted by the undersigned at Chicago, Illinois, and counsel for the Employer and Petitioner appeared and participated. All

parties were afforded an opportunity to be heard, to examine and cross-examine witnesses, to produce relevant evidence and to thereafter submit briefs.

After careful consideration of the entire record, including the briefs filed by both parties, I make the following findings of facts and recommendations.

THE CHALLENGES

The ballots of O. Arriaga and D. Kelly were challenged by the Employer on the basis that they are supervisors within the meaning of the Act and the ballots of T. Galvez and R. Flores were challenged by the Board Agent because their names did not appear on the voter eligibility list. In addition, the ballot of an unidentified voter was challenged by the Employer on the basis that the intent of that voter was not clear. However, during the hearing the Petitioner

and Employer offered a stipulation that T. Galvez was hired on June 21, 1988, and R. Flores was hired on July 6, 1988. Inasmuch as the payroll period for eligibility in this case was June 18, 1988, they stipulated that T. Galvez and R. Flores are ineligible voters and their votes shall not be counted.

The above stipulation was received by the undersigned and it is hereby recommended that it be accepted by the Board. If so, the effect will be that of 31 valid votes counted, 18 will have been cast for and 13 will have been cast against the Petitioner, and the three remaining challenged ballots will no longer be determinative.

THE OBJECTIONS

The Employer filed four objections. However, during the hearing the Employer requested that its second, third and fourth objections be withdrawn. Especially in light

of the fact that the Petitioner stated it has no objections to that request, it is hereby recommended that the Board approve the Employer's withdrawal request of its second, third and fourth objections.

The only remaining and substantive issue before me is the Employer's first objections, which reads as follows:

> Employees involved in the election were insufficiently apprised of their choice in the election due to Region's failure to provide a bilingual (English/Spanish) ballots despite the fact that over ninety percent of the voters speak and read Spanish as their primary language, and over fifty percent speak and read Spanish as their sole language.

None of the facts with respect to this objection are in dispute. The Employer and Petitioner stipulated that about 10 of those employees who voted in the election (36 ballots were cast including challenges), are unable to read or speak English. Charles Pautsch, the attorney for the Employer, who

had dealt with the Regional office at the pre-election stage of this case, testified that subsequent to the issuance of the Decision and Direction of Election, he spoke with the Board Agent assigned to the case to discuss the details of the election. In that conversation he requested that both the ballots and the Notices of Election be in Spanish as well as English. When he was informed that the Region's policy was to furnish Notices of Election in any required language but that the ballots would only be printed in English he protested that, in his experience, other NLRB regions had printed bilingual ballots. On about July 21, 1988, a week before the election, Pautsch again requested of the Board Agent that the ballots be bilingual but he was again informed that the Regional office would only print the ballots in English.

Christopher Clark, the Employer's Quality Assurance Manager, testified that, at least one week before the election, he received from the Board's Regional Office, Notices of Election in both English and Spanish. He immediately posted these Notices in the break area where they would be most easily seen by the unit employees. The Notices, in both languages, remained posted in the break area until the date of the election.

Mr. Clark also testified that, about four or five days before the election, he discovered that the posted English and Spanish Notices both had an "X" marked in each "yes" box. Clark removed these Notices and posted two unmarked Notices, which were not subsequently defaced. Mr. Clark also testified that, on the day before the election, on a table of refreshments for the use of employees, in the break area, he dis-

covered two cardboard liners on which markings were made. On one of the liners, the words "yes" and "no" were written, and under the "yes" is a column of six "X's" and the word "yes" next to each "X". On the other liner, the words "yes" and "no" were written with a square drawn under each word but with no marking in either square. Mr. Clark testified that he does not know how long the marked liners were in the break area, although he is certain it could not have been more than one day, and again, he does not know who placed the marks on the liners. Although neither the defaced Notices nor the marked liners were alleged as objectionable conduct, the Employer, in its brief to the undersigned, makes reference to them to enhance its argument that the defaced Notice contributed to voter confusion caused by the absence of a bilingual ballot.

The only other evidence presented during the hearing was the Employer's submission of Notices of Election prepared by another Board Regional Office in a representation case in which the Notices were printed in English and Spanish. The sample ballot contained in the Spanish Notice is written in English with accompanying Spanish translations. From this it appears that the ballots used in this election may have been printed in Spanish as well as English.

In its brief the Employer argues that the absence of a Spanish ballot resulted in sufficient voter confusion to require that the election be set aside and a second election be held. It relies on the Board's Casehandling Manual (Part Two), Representation Proceedings, as authority for the requirement that in bilingual elections the ballots must also be printed in the necessary foreign language. Especially in light of the

apparent practice of another Board Regional Office of using bilingual ballots, the Employer takes the position that, when required, a Regional Office must provide bilingual ballots in order to conduct a valid election.

In its brief the Employer states that in Bridgeport Fittings, Inc., 288 NLRB No. 25 (1988), and Fibre Leather Mfg. Corp., 167 NLRB 393 (1967), the Board "sanctioned" the use of bilingual ballots. If by the use of that phrase the Employer means that the Board had no objection to the use of bilingual ballots in those cases, it is correct. In Bridgeport Fittings, Inc., the Board dealt with the question of whether a bilingual ballot contained translations in so many languages that it caused confusion among the voters. In Fibre Leather Mfg. Corp., the Board found the absence of bilingual notices, as well as bilingual ballots, objectionable.

However, in either case was the Board presented with the issue of whether it was objectionable for there to be bilingual notices but not bilingual ballots. Therefore, in neither case did the Board set forth any requirement that bilingual notices must be accompanied by bilingual ballots.

The Employer is correct when it states in its brief that in the Board's Case-handling Manual (Part Two), Representation Proceedings, Section 11314 provides, in part:

> Foreign Language: Notices printed in a foreign language may also be posted. If a foreign language is used, that language must also be used on the ballot.

However, the preliminary section of the Manual, entitled, "Purpose of Manual" provides:

> This manual has been provided by the General Counsel of the National Labor Relations Board pursuant to powers delegated to him by the board. It is intended to provide procedural and operational

> guidance for the Agency's staff in the handling of representation cases under the National Labor Relations Act. It is not intended to be compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law. The guidelines included are not Board rulings or directives and although it is expected that they will be followed by staff employees in the handling of cases, it is also expected that there may be departures through exercise of professional judgment in varying circumstances. They are not intended to be and should not be viewed as binding procedural rules (emphasis supplied).

In Thomas A. Nelson d/b/a Trio Metal Cap Division, 168 NLRB 802 (1967), the Board found it unnecessary to have both bilingual election notices and ballots. It held that although the ballots were in English only, "the notices of election were in English, Polish and Spanish, thereby assuring the Polish and Spanish-speaking employees of an opportunity to make an effective and informed expression of their true desires."

The English-only ballot, with the sample ballots on the Notices to Election in appropriate foreign languages, avoids the problems which arose in Kraft, Inc., Retail Food Group, 273 NLRB 1484 (1985), wherein the Board found that the ballot was "so defective on its face as to interfere with the employees' ability to exercise their election choice." Thus, instead of several languages on one ballot, each notice herein has a ballot in that Notice's language with an explanation that the ballot handed the voters at the election would be identical, but in English. (It should be noted that even in those Regions where foreign language ballots are provided, the name of the Employer and the name of the Union or Unions remain in English.) In this way, the ballot remains as simple as possible to all voters while still understandable (when combined with Notices)

to those voters who neither read nor write English.

In its brief, citing Farleigh Dickinson University, 264 NLRB 725 (1982), the Employer asserts that it is irrelevant that there is no evidence in the record to show actual confusion by voters because the ballot was not printed in Spanish because the test for interference, restraint or coercion under Section 8(a)(1) does not turn on an employer's motive or whether the conduct actually succeeded. While that surely is a test the Board applies in unfair labor practice cases, it does not necessarily restrict such an analysis in an objections forum. Thus, in Marriott In Flite Services, 171 NLRB 742, 743 fn. 4 (1968), the Board stated:

> We distinguish Fibre Leather Mfg. Corp., 167 NLRB 393, issued in September 1967, in that the notices of election posted in that

case were in English only, whereas here the notices were provided in Spanish as well as English. The sample ballot attached to both the Spanish and English notices was printed in English, in the form distributed at the polls. Thus a sample ballot in English was available for advance consideration by the employees along with notices explaining the election procedure in both languages. In addition, the ballot was a simple one, having the name of only one union and the usual squares for marking by the voter, one with "yes" written above and one with "no". The word "no" is the same in both Spanish and English. We are not persuaded that Spanish-speaking employees gainfully employed in the United States fail to comprehend that "yes" and "is" mean the same thing. In supplying ballots in English along with notices in appropriate foreign languages, the Regional Director for Region 13 has in the past proceeded on the principle that secrecy of the ballot is, to a degree, violated whenever a block of votes, by reason of language, can be identified when counted. The Regional Director, we believe was within his discretion in so proceeding. The view that ballots and notices should ordinarily be in the same language is also sound. Here we note the lack of any showing that voter misunderstanding

> resulted from the English ballots explained by the Spanish notices of election. The Respondent's contention that there "may" have been language confusion is entirely speculative. The official observers for both parties included observers who spoke both Spanish and English, the Respondent having one such observer at all voting sessions and the Union one at most sessions. These observers certified on the tally that the election was fairly conducted. We are satisfied that it was. See Thomas A. Nelson, d/b/a Trio Metal Cap Co., 168 NLRB 802, and Ploymers, Inc., 170 NLRB 333.

The Employer claims that the alleged but unproven confusion suffered by the Spanish voters was made worse by the defaced notice and other pieces of propaganda it discovered. Again, however, there is no evidence in the record to show or even provide an indication that this material had the effect of creating confusion among any of the voters. I would also note that in cases where there is no evidence attributing responsibility for such defacement to the successful party to an

election, the Board has refused to set aside the election. Patsy Bee, Inc., 249 NLRB 987 (1980), Keller Dye & Finishing Company, 184 NLRB 525 (1970).

The facts in this case simply show that the Employer informed the Regional Office that a portion of the voters spoke and read Spanish only. In response the Regional Office followed its routine practice and provided the Notice of Election, but not a ballot, in Spanish as well as English. On the Spanish notice, a copy of which is attached, immediately above the sample ballot, is a sentence informing the voters that, when they vote, they will receive an English ballot which, except for the language, is an exact translation of the sample ballot. Here, as in Marriott In Flite Services (supra), the Employer's contention that there "may" have been language confusion is entirely speculative. Therefore, under

all of the circumstances and based on the evidence developed during the hearing, it is my opinion that the failure to provide a foreign language ballot is not objectionable and did not interfere with the right of voters who neither read or speak English to cast an informed ballot.[1]

CONCLUSION AND RECOMMENDATION

Based on the findings and conclusions above, I recommend that in light of the parties' stipulations that T. Galvez and R. Flores were not eligible voters, a Revised Tally of Ballots be prepared and served on

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1. I note that on March 17, 1987, the Board adopted the Regional Director's Supplemental Decision on Objections and Certification of Representative in Araclean Services, Inc. A Division of Aratex Services, Inc., Case 13-RC-17012, in which the Regional Director overruled an objection on the use of a bilingual Notice of Election unaccompanied by a bilingual ballot.

the parties showing that of the 31 valid votes cast, 18 were cast for and 13 were cast against the Petitioner and the three remaining challenged ballots are no longer determinative. It further recommends that the sole remaining objection be overruled and a Certification of Representative issued.

DATED this 3rd day of October, 1988, at Chicago, Illinois.

Walter W. Hoffman
Hearing Officer
National Labor Relations Board
Region 13
219 S. Dearborn St., Room 881
Chicago, Illinois 60604

Attachment

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2. As provided in Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, exceptions to this Report may be filed with the Board, in Washington, D.C. within fourteen (14) days from the date of issuance of this Report. Immediately upon filing such exceptions, the party filing same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director of Region 13. If no exceptions are filed, the Board may adopt the recommendation of the Hearing Officer.

CERTIFICATE OF SERVICE

Copies of the Hearing Officer's Report on Objections and Challenged Ballots have, this 30th day of September, 1988 been sent by certified mail to the following parties of record:

Int'l. Union of Electronic,
Electrical, Salaried, Machine and
Furniture Workers, AFL-CIO
5238 West 25th Street
Cicero, IL 60650
Attn: John W. Dan, Union Rep.

Precise Castings, Inc.
9234 Park Lane
Franklin Park, IL 60131
Attn: Joe Dyer

Herb Adams, Esq.
188 West Randolph
Chicago, IL 60601

Richard H. Wessels & Associates
509 W. Wisconsin Ave., Suite 747
Milwaukee, WI 53203
Attn: Charles W. Pautsch

FIRST CLASS MAIL
John C. Truesdale, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue N.W.
Washington, D.C. 20570

Walter Hoffman
Hearing Officer

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THIRTEEN

PRECISE CASTINGS, INC.,

Employer,

and Case No. 13-RC-17367

INTERNATIONAL UNION OF
ELECTRONIC, ELECTRICAL,
SALARIED, MACHINE AND
FURNITURE WORKERS, AFL-CIO,

Petitioner.

OBJECTIONS TO ELECTION

NOW COMES the Employer, Precise Castings, Inc., by its attorney, Charles W. Pautsch, of Richard H. Wessels & Associates, and hereby states its objections to the election held in this matter on July 28, 1988:

1. Employees involved in the election were insufficiently apprised of their choice in the election due to the Region's failure

to provide a bilingual (English/Spanish) ballot, despite the fact that over ninety percent of the voters speak and read Spanish as their primary language, and over fifty percent speak and read Spanish as their sole language.

2. Employees involved in the election were denied a free and uncoerced opportunity to exercise their rights guaranteed by the National Labor Relations Act by the involvement of a supervisor in various critical stages of the union's organizing efforts.

3. Employees involved in the election were denied a free and uncoerced opportunity to exercise their rights guaranteed by the National Labor Relations Act by and through the union's action of promising employees that they would "do things for them on the outside."

4. Employees involved in the election were denied a free and uncoerced opportunity to exercise their rights guaranteed by the National Labor Relations Act by and through the actions of agents of the union threatening employees with either physical harm or loss of jobs in the event that threatened employees did not support the union.

WHEREFORE, the Employer requests that the results of this election be set aside, and that either petition be dismissed due to supervisory taint or that a second election be held in this matter.

Dated this 3rd day of August, 1988.

PRECISE CASTINGS, INC.

By_____
One of its Attorneys

Charles W. Pautsch
Richard H. Wessels & Associates
509 West Wisconsin Avenue, Suite 747
Milwaukee, WI 53203
(414) 226-4077

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO Furniture Workers Division - Local 18-B, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All regular full-time and regular part-time production, maintenance, and tool room employees employed by the Employer at its facility now located at 9234 Park Lane, Franklin Park, Illinois; but exclu-

ding all office employees, guards, and supervisors as defined in the Act.

PRECISE CASTINGS, INC.

(Employer)

Dated_____ By_____
(Representative)

_____
(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 200 West Adams Street, Suite 800, Chicago, Illinois 60606-5208, Telephone (312) 353-7597.

Supreme Court, U.S.
FILED
MAR 20 1991
OFFICE OF THE CLERK

No. 90-1143

In the Supreme Court of the United States

OCTOBER TERM, 1990

PRECISE CASTINGS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
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National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that it is permissible to use English-only ballots in a Board-conducted election if foreign language notices translating the ballot and explaining the election procedure are posted prior to the election.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Bridgeport Fittings, Inc. v. *NLRB*, 877 F.2d 180 (2d Cir. 1989)	9, 10, 12, 13
Celotex Corp., 266 N.L.R.B. 802 (1983)	13
Flo-Tronic Metal Mfg., Inc., 251 N.L.R.B. 1546 (1980)	8, 11
Gory Associated Industries, Inc., 275 N.L.R.B. 1303 (1985)	13
Kraft, Inc. Retail Food Group, 273 N.L.R.B. 1484 (1985)	9, 10, 11
Marriott In-Flite Services, 171 N.L.R.B. 742 (1968), enforcement denied, 417 F.2d 563 (5th Cir. 1969), cert. denied, 397 U.S. 920 (1970)	3, 6, 9, 10, 12, 13
Midland National Life Ins. Co., 263 N.L.R.B. 127 (1982)	6, 13
NLRB v. *A.J. Tower Co.*, 329 U.S. 324 (1946)	5, 7
NLRB v. *Financial Institution Employees, Local 1182*, 475 U.S. 192 (1986)	7
NLRB v. *Lowell Corrugated Container Corp.*, 431 F.2d 1196 (1st Cir. 1970)	9
NLRB v. *Mattison Mach. Works*, 365 U.S. 123 (1961)	7, 8
NLRB v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1982)	11
NLRB v. *Waterman S.S. Corp.*, 309 U.S. 206 (1940)	7
NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969)	7

Cases—Continued: Page

Northwestern Products Inc., 226 N.L.R.B. 653 (1976) 9
Puerto Rican Org. for Political Action v. *Kusper*, 490 F.2d 575 (7th Cir. 1973) 11, 12
Rattan Art Gallery, Ltd., 260 N.L.R.B. 255 (1982) 8, 9, 11
Tanforan Park Food Purveyors Council v. *NLRB*, 656 F.2d 1358 (9th Cir. 1981) 8, 9, 12, 13
Thermalloy Corp., 233 N.L.R.B. 428 (1977) 8, 11
Thomas A. Nelson, 168 N.L.R.B. 802 (1967) 3, 9

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 7, 29 U.S.C. 157 7
§ 8(a)(1), 29 U.S.C. 158(a)(1) 4
§ 8(a)(5), 29 U.S.C. 158(a)(5) 4

Miscellaneous:

52 Fed. Reg. 7450 (1987) 8
NLRB Casehandling Manual (Pt. 2) (1989) 4

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1143

PRECISE CASTINGS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 915 F.2d 1160. The decision and order of the National Labor Relations Board (Pet. App. 10a-21a) are reported at 294 N.L.R.B. No. 94. The Board's decision and certification of election (Pet. App. 22a-24a) and the hearing officer's report (Pet. App. 25a-44a) in the underlying representation proceeding are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on October 17, 1990. The petition for a writ of certiorari was filed on January 15,

1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May 1988, the Union [1] filed a petition with the National Labor Relations Board seeking certification as the exclusive bargaining agent of a unit of production and maintenance employees at petitioner's Franklin Park, Illinois, facility. The unit covered about 40 employees, approximately ten of whom speak and read Spanish but cannot speak or read English. Pet. App. 1a, 26a, 30a. During discussions about the details of the election, petitioner's attorney asked the Board agent handling the case to provide both Spanish-language election notices and Spanish-language ballots. The Board agent responded that the regional office would issue election notices, on request, in any foreign language, but that it was this region's policy to use only English-language ballots in elections. *Id.* at 30a-31a.

Petitioner received notices of the election in both English and Spanish, and posted the notices in the employees' break area. Pet. App. 32a. The notices set forth information about the employees' rights and the election procedure. The English-language notice displayed a sample of the English-language ballot that would be used in the election. The Spanish-language notice displayed a Spanish translation of the sample ballot. Immediately above the sample ballot on the Spanish-language notice was a sentence informing the voters that the ballot handed them at the election would be identical except that it would be in

[1] Local 18-B of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, Furniture Workers Division.

English. *Id.* at 5a, 38a-39a, 42a. A secret ballot election was held on July 28, 1988. The Union won by a vote of 18 to 13. *Id.* at 1a, 22a-23a, 25a-26a, 28a-29a.

2. Petitioner filed objections to the conduct of the election. Petitioner contended, among other things, that the election should be set aside because Spanish-language ballots had not been provided to the ten voters who could not read English. The Board's hearing officer concluded, however, that there was no evidence that the notice and balloting procedures used in the election were confusing to the employees. Pet. App. 41a-43a.

The hearing officer rejected petitioner's contention that Board rules required multilingual ballots whenever notices in more than one language were used. He concluded that where there are multilingual notices, the Board has found it unnecessary to have multilingual ballots as well. Pet. App. 37a-39a, citing *Thomas A. Nelson*, 168 N.L.R.B. 802 (1967), and *Marriott In-Flite Services*, 171 N.L.R.B. 742, 743 n.4 (1968), enforcement denied, 417 F.2d 563 (5th Cir. 1969), cert. denied, 397 U.S. 920 (1970). He also noted that in some of the Board cases where multilingual ballots had been used the use of such ballots had been the subject of election objections, the losing party alleging that the ballot contained translations in so many foreign languages as to be confusing to voters. Pet. App. 34a-39a. The hearing officer justified the use of an English-language ballot for all voters on the ground that "the ballot remains as simple as possible to all voters while still understandable (when combined with Notices) to those voters who neither read nor write English." *Id.* at 38a-39a.

The hearing officer also rejected petitioner's contention based on a statement in the General Counsel's internal administrative manual that, if a foreign language is used in a notice, that language must also be used on the ballot. Pet. App. 36a-37a. He noted that the foreword to the manual stated that the manual "is intended to provide procedural and operational guidance for the Agency's staff in the handling of representation cases," that "[i]t is not intended to be a compendium of either substantive or procedural law," that "[t]he guidelines included are not Board rulings or directives," that "it is also expected that there may be departures [from the guidelines] through exercise of professional judgment in varying circumstances," and that any guidelines contained therein "are not intended to be and should not be viewed as binding procedural rules." *Id.* at 36a-37a (emphasis omitted), quoting NLRB Casehandling Manual (Pt. 2), Representation Proceedings, Introduction and Purpose.[2]

Petitioner filed exceptions to the hearing officer's report. Thereafter, the Board adopted the hearing officer's findings and recommendations, and certified the Union as the representative of the bargaining unit. Pet. App. 22a-24a. After certification, petitioner refused to bargain with the Union in the certified unit. The Board found that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1); and entered a bargaining order. Pet. App. 15a.

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[2] In the September 1989 revision of the Casehandling Manual, the relevant provision of the Manual was amended to make clear that the use of a foreign language on the ballot is discretionary. See NLRB Casehandling Manual (Pt. 2), Representation Proceedings, § 11314 (1989).

3. The court of appeals enforced the Board's order. Pet. App. 8a. Relying upon *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324 (1946), the court noted that "the Board possesses discretion to set the rules for conducting elections and to determine what procedures suffice to protect employees' right to choose." Pet. App. 4a. Applying that principle, the court concluded that use of multilingual notices and English-only ballots was a reasonable exercise of the Board's discretion.

The court observed that "most ballots in political elections are in English" and that "[m]aking labor elections more like political elections is among the Board's legitimate choices." Pet. App. 4a. Moreover, "[t]he Board does not leave the workers to learn from the election campaign alone." *Id.* at 5a. The Board, upon request, will provide elaborate foreign-language election notices, complete with sample ballots and explanations, in all foreign languages spoken by employees, that advise the employees that the actual ballot will be in English. Therefore, "[a]nyone who takes the trouble to read the notice will be equipped to vote accurately." *Ibid.*

The court rejected the argument that foreign-language notices were insufficient because employees might not read them. The court concluded that it was within the Board's discretion to concentrate on giving employees "a reasonable *opportunity* to vote intelligently, without taking all possible steps to ensure that they do," particularly because the other options "have problems of their own." Pet. App. 6a. The court noted that printing ballots in different languages for members of different language groups runs the risk of allowing the parties to "link a vote to a given voter, breaching the confidentiality of the

polling place." *Ibid.* And experience has shown that putting "all of the languages on every ballot" works "less well as the number of languages increases—and as the ballot must include languages that cannot be expressed in the Roman alphabet." *Ibid.*

The court also found petitioner's reliance on *Marriott In-Flite Services* v. *NLRB*, 417 F.2d 563 (5th Cir. 1969), cert. denied, 397 U.S. 920 (1970), to be misplaced. Pet. App. 2a-3a. Although the *Marriott* court believed that the Board in that case had departed from its policy of always using multilingual ballots, see 417 F.2d at 567, the court below observed that any such Board policy no longer exists. Pet. App. 2a. The court below added that changes in the Board's philosophy toward the regulation of representation elections have "pulled the rug out from under" the Fifth Circuit's decision in *Marriott*. Pet. App. 3a (citing, *e.g.*, *Midland National Life Ins. Co.*, 263 N.L.R.B. 127 (1982)).

Finally, the court of appeals rejected petitioner's assertion that it was improper for the Board to leave "to its regional directors the choice among multilingual ballots, ballots in different languages, and English-language ballots plus election notices in other languages." Pet. App. 7a. The court concluded that "[n]othing in the National Labor Relations Act prevents the Board from giving its subordinates discretion in matters of this kind." *Id.* at 7a-8a. Moreover, the court noted, the Board could reasonably decide that, by allowing its regional offices to follow different paths, it could "learn" from their experiences "about the need for or effects of its rules." *Id.* at 8a. Indeed, the court added, allowing such differences permits the Board to determine which of several competing options is preferable or to decide that "the

costs and benefits of the competing options are so closely balanced that uniformity is unnecessary." *Ibid.*

ARGUMENT

As this Court has explained, the control of a representation election proceeding and the determination of the steps necessary to conduct that election fairly are "matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940). Thus, the Board has a "wide degree of discretion" in its regulation of the conduct of representation elections, *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946), and any representation election conducted under the specific safeguards provided by the Board's procedures is presumed fair and regular unless proven otherwise. See *NLRB* v. *Mattison Mach. Works*, 365 U.S. 123, 123-124 (1961).[3] The court of appeals correctly concluded that the Board properly exercised its discretion here. The court's decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

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[3] There is no merit to petitioner's contention (Pet. 29 n.11, 30) that because *A.J. Tower Co.* was decided before the 1947 amendments to the Act—and, specifically, before the addition to Section 7 of the right to refrain from union and other protected, concerted activity—its recognition of the Board's broad discretion with respect to election matters is of dubious continuing validity. This Court has consistently confirmed that the Board's policies in representation matters are due great deference. See *NLRB* v. *Financial Institution Employees, Local 1182*, 475 U.S. 192, 201-202 (1986); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). And contrary to petitioner's implication, the Board's policy here has no different impact on employees who may oppose the union than on those who support it.

1. The Board has developed flexible procedures for accommodating the election process to the needs of voters literate only in a foreign language. Under the Board's current policy, where (as here) the parties give the Board's regional office timely notice that some voters do not read English, the regional office will provide foreign-language notices and sample ballots that are designed for posting by the employer and that explain the balloting procedure and the type of ballot to be used. See 52 Fed. Reg. 7450 (1987) (explanatory remarks). The Board requires that foreign-language notices provide a complete and reasonably accurate translation of all the information provided to English-language employees on the English-language notice of election. *Rattan Art Gallery, Ltd.*, 260 N.L.R.B. 255, 256-257 (1982); *Flo-Tronic Metal Mfg., Inc.*, 251 N.L.R.B. 1546 (1980); *Thermalloy Corp.*, 233 N.L.R.B. 428 (1977). See *Tanforan Park Food Purveyors Council* v. *NLRB*, 656 F.2d 1358 (9th Cir. 1981). Consistent with that requirement, the Spanish-language notice used in this case contained a translation of the official ballot and all other portions of the notice of election.[4]

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[4] Petitioner asserts (Pet. 32) that there is "insufficient evidence in the record below that this election was conducted in such a way as to insure that employees * * * were afforded a fair opportunity to be apprised of the important choice [with which] they were faced." However, the premise of this argument—that the burden is on the Board to show that the election was fairly conducted—reverses the appropriate allocation of the burden of proof. Thus, a Board-conducted election is presumed to have been fair and regular, and it is the objecting party that must show that, in fact, it was not. *NLRB* v. *Mattison Mach. Works, supra.* As both the Board and the court below found (Pet. App. 2a, 8a)—and petitioner apparently concedes (see Pet. 7-8, 14, 15 & n.4)—there is no evi-

Many regional offices will also provide foreign-language ballots like those petitioner requested here.[5] No Board rule or decision, however, requires that foreign-language ballots be provided on demand. See *NLRB* v. *Lowell Corrugated Container Corp.*, 431 F.2d 1196, 1197 (1st Cir. 1970). To the contrary, the Board has expressly held that a regional director who has posted foreign-language notices explaining the election procedure has the discretion to use an English-only ballot in the election. *Thomas A. Nelson*, 168 N.L.R.B. at 803; *Marriott In-Flite Services*, 171 N.L.R.B. at 743 n.4. See also *Norwestern Products, Inc.*, 226 N.L.R.B. 653, 654 n.6 (1976) (noting the Board's continued adherence to its *Marriott* decision).

In refusing to mandate use of foreign-language ballots in all cases, the Board has taken into account the competing considerations of providing adequate information to non-English speakers, on the one hand, and maintaining secrecy of the ballot and ballot clarity, on the other. It is one thing to prepare sample ballots in any foreign language requested, and to make such samples a part of the relevant foreign-language translation of the Board's official notice of election. It would be quite another matter, however, to use foreign-language ballots in the election itself.

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dence that any of the voters in this election were "confused" by the notice and ballot procedures used.

[5] See, *e.g.*, *Bridgeport Fittings, Inc.* v. *NLRB*, 877 F.2d 180, 187 (2d Cir. 1989) (ballot printed in English, Spanish, Portuguese, and handwritten in Laotian); *Tanforan Park Food Purveyors Council* v. *NLRB*, 656 F.2d 1358 (9th Cir. 1981) (Samoan-English ballot); *Kraft, Inc. Retail Food Group*, 273 N.L.R.B. 1484 (1985) (ballot printed in Spanish and English and handwritten in Vietnamese and Laotian); *Rattan Art Gallery, Ltd.*, 260 N.L.R.B. 255 (1982) (English-Ilocano ballot).

As the Board has explained, the "secrecy of the ballot is, to a degree, violated whenever a block of votes, by reason of language, can be identified when counted." *Marriott In-Flite Services*, 171 N.L.R.B. at 743 n.1.[6]

The problem of ballot secrecy could be surmounted by constructing a single multilingual ballot for use by all voters. However, as the Board noted (Pet. App. 34a-39a), constructing multilingual ballots that are not confusing even to English-language voters has proven difficult, especially where portions of the official ballot must be handwritten. See, *e.g.*, *Kraft, Inc.*, 273 N.L.R.B. at 1484 (setting aside election because ballot printed in Spanish and English and handwritten in Vietnamese and Laotian was confusing in format).

Furthermore, a rule authorizing bilingual ballots only in seemingly "easy" cases, where there is but one foreign-language group, but withholding them in more complicated cases, also has its drawbacks. Attempts to hold down the number of languages on a multilingual ballot in the interest of readability would predictably raise concerns of discrimination against smaller groups, who would naturally be the ones excluded under any utilitarian calculus. *Kraft Inc.*, 273 N.L.R.B. at 1484-1485; see also *Bridgeport Fittings, Inc.* v. *NLRB*, 897 F.2d 180, 188 (2d Cir. 1989).[7]

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[6] This concern is particularly important because, like the instant election, Board-conducted elections typically involve fewer than 50 employees.

[7] Petitioner's contention (Pet. 16-24) that the Board has failed to articulate its rationale for its accommodation policy is without merit. As shown in the text, the Board, in a number of decisions, has explained its reasons for accepting some and rejecting other accommodation efforts. Contrary to petitioner's suggestion (see Pet. 17, 20 n.7), the fact that the

Moreover, as the court below noted (Pet. App. 4a), the Board's use of English-language ballots is consistent with the general practice in political elections. Indeed by assuring that each foreign-language voter has access to an election notice and sample ballot in his own language, the procedure followed here offers all language minorities a level of assistance exceeding that frequently afforded them in political elections.[8]

Board has explicitly addressed only some of those reasons in its decisions here does not detract from the fact that the Board has sufficiently articulated the basis of its order to "meet[] the criteria for judicial review." *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 & n.6.

There also is no merit to petitioner's assertion (Pet. 18-20) that the Board's decision here is inconsistent with some of the Board decisions discussed above. In *Kraft, Inc., supra*, the Board addressed the issue of whether a confusing multilingual ballot was grounds for setting aside an election once use of "a multilingual ballot [ha]s [been] deemed appropriate." 273 N.L.R.B. at 1484. It was in that context—in which a multilingual ballot was actually used—that the Board stated that a poor translation on, and a confusing layout of, the ballot created a defect that could not be cured by accurate election notices and the parties' campaigning. Thus, the *Kraft* decision fully supports the result here. *Rattan Gallery, Ltd.*, 260 N.L.R.B. 255 (1982), *Flo-Tronic Metal Mfg., Inc.*, 251 N.L.R.B. 1546 (1980), and *Thermalloy Corp.*, 233 N.L.R.B. 428 (1977), dealt not with a refusal to provide a foreign-language ballot, but with defects in foreign-language election notices.

[8] Petitioner attacks the court's finding that the procedure used here is essentially consistent with that used in political elections, suggesting (Pet. 31-32) that it is inconsistent with the Seventh Circuit's decision in *Puerto Rican Org. for Political Action* v. *Kusper*, 490 F.2d 575 (1973). However, *Kusper* supports—rather than undercuts—the use of the procedure chosen here. In *Kusper*, the court held only that under the Voting Rights Act of 1965, "a Spanish-speaking Puerto Rican is entitled to assistance in the language he can read or under-

2. Petitioner contends (Pet. 10-15) that there is a conflict warranting this Court's resolution between the decision below and decisions from three other circuits: *Marriott In-Flite Services* v. *NLRB*, *supra*; *Bridgeport Fittings, Inc.* v. *NLRB*, *supra*; and *Tanforan Park Food Purveyors Council* v. *NLRB*, 656 F.2d 1358 (9th Cir. 1981). No such conflict exists.

As the court below noted (Pet. App. 2a), the Fifth Circuit in *Marriott* believed that the Board had unaccountably departed from a policy of requiring bilingual ballots. Such a policy, if it existed then, does not exist now. Moreover, in *Marriott*, unlike here, the election notices posted near the polling place "contained no sample ballot in Spanish." 417 F.2d at 567. As a result, the Spanish-language voters in that case were never officially advised in their own language of the meaning of "the question and instructions on the ballot." *Ibid.* It was in this context that the *Marriott* court pronounced the Board's failure to provide "access to ballots in a language that [the foreign-language electorate] can understand" a "defect" that warranted setting aside the election. *Ibid.*[9]

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stand" (*id.* at 580). The court also approved the assistance ordered by the district court—that is, use of foreign-language notices and specimen ballots—and suggested that foreign-language ballots were unnecessary where foreign-language specimen ballots have been provided in advance. *Id.* at 576-577.

[9] Moreover, as the court below noted (Pet. App. 3a), the *Marriott* court's belief that "minimum laboratory standards of fairness" required foreign-language ballots was expressly linked to the Board's then-current election standards, including the Board's rules holding campaign representations to a higher standard than that allowed in the political arena. See

In *Bridgeport Fittings*, the one Vietnamese and two Cambodian voters about whom the court expressed concern had access to *neither* an election notice with specimen ballot nor a ballot in a language they could read and understand.[10] Moreover, because the court ultimately enforced the Board order, finding that the number of employees denied access to notices and ballots in their own language was small and the union's margin of victory was large, the court's statement about the ballot—that the Board's failure to include a version in Vietnamese and Cambodian gave "pause"—is dictum. 877 F.2d at 187-188. Finally, *Tanforan Park* involved the issue of the sufficiency of a foreign language notice. The court held that the Board should hold a hearing to ascertain whether the election notice was "garbled and confusing." 656 F.2d at 1362-1363 (Samoan translation allegedly suggested endorsement of union).

3. Petitioner asserts (Pet. 28 n.10) that the lack of uniformity of procedure among the Board's Re-

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417 F.2d at 567 & n.4. As the court below further noted (Pet. App. 3a), the Board's current policies assume that an informed employee electorate does not require extensive regulation of the campaign process. See *Midland National Life Ins. Co.*, 263 N.L.R.B. 127 (1982). While it is true, as petitioner asserts (Pet. 21-24), that the Board continues to set aside elections where irregularities in the election process may have affected the outcome of the election (see, *e.g.*, *Gory Associated Industries, Inc.*, 275 N.L.R.B. 1303 (1985); *Celotex Corp.*, 266 N.L.R.B. 802 (1983)), the question here is whether the Board reasonably concluded that foreign-language notices with sample ballots are adequate to assure an informed electorate.

[10] See *Bridgeport Fittings, Inc.*, Case 39-RD-67, Second Supplemental Decision and Certification of Representative at 13-14 (May 17, 1985).

gional Offices is fundamentally inconsistent with Congress's intention to have the Board establish a uniform national labor policy. There is no merit to that contention. As shown, Congress also vested the Board with broad discretion to establish rules for the conduct of representation elections. The court of appeals correctly decided that, in view of the substantial drawbacks to the use of foreign-language ballots, the Board could reasonably choose not to require uniformity but rather to allow different regional approaches as a way of learning whether one was preferable, or whether "the costs and benefits of the competing options are so closely balanced that uniformity is unnecessary." Pet. App. 8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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